SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1278

MARY ELIZABETH BLETHROADE SUTT, ELIZABETH MAY JACKSON, CAREY McWILLIAMS and CASLEY McWILLIAMS, Known Heirs, and the Unknown Heirs of HOMER McWILLIAMS, Deceased,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY; JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI; LAKESIDE HOSPITAL ASSOCIATION; JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY; RESEARCH HOSPITAL AND MEDICAL CENTER; KANSAS CITY COLLEGE OF OSTEOPATHIC MEDICINE; NORTHEAST OSTEOPATHIC HOSPITAL; SISTERS OF SAINT MARY (Owning and Operating St. Mary's Hospital); KANSAS CITY GENERAL HOSPITAL AND MEDICAL CENTER; CHILDREN'S MERCY HOSPITAL; MARTIN LUTHER KING, JR., MEMORIAL HOSPITAL; ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI; KANSAS CITY LUTHERAN HOME AND HOSPITAL ASSOCIATION; BAPTIST MEMORIAL HOSPITAL; and INDEPENDENCE SANITARIUM AND HOSPITAL,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, THE FIRST NATIONAL BANK OF KANSAS CITY

HILARY A. BOSH
KENT SNAPP
1414 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Respondent, The First National Bank of Kansas City

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

REASONS WHY THE WRIT SHOULD NOT BE GRANTED—

I. There is no special or important reason for granting the writ 8

II. The decision of the Supreme Court of Missouri is correct and is not in conflict with any decision of this court 9

CONCLUSION 14

Table of Authorities

Burton v. *Wilmington Parking Authority*, 365 U.S. 715 9

Evans v. *Abney*, 396 U.S. 435 12

Thatcher v. *City of St. Louis*, 122 S.W.2d 915 12

9 C.J.S. 552 Banks 11

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1279

MARY ELIZABETH BLETHROADE SUTT, ELIZABETH MAY JACKSON, CAREY McWILLIAMS and CASLEY McWILLIAMS, Known Heirs, and the Unknown Heirs of HOMER McWILLIAMS, Deceased,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY; JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI; LAKESIDE HOSPITAL ASSOCIATION; JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY; RESEARCH HOSPITAL AND MEDICAL CENTER; KANSAS CITY COLLEGE OF OSTEOPATHIC MEDICINE; NORTHEAST OSTEOPATHIC HOSPITAL; SISTERS OF SAINT MARY (Owning and Operating St. Mary's Hospital); KANSAS CITY GENERAL HOSPITAL AND MEDICAL CENTER; CHILDREN'S MERCY HOSPITAL; MARTIN LUTHER KING, JR., MEMORIAL HOSPITAL; ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI; KANSAS CITY LUTHERAN HOME AND HOSPITAL ASSOCIATION; BAPTIST MEMORIAL HOSPITAL; and INDEPENDENCE SANITARIUM AND HOSPITAL,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, THE FIRST NATIONAL BANK OF KANSAS CITY

OPINION BELOW

The Opinion of the Supreme Court of Missouri, not yet published, appears in Appendix A to the Petition herein

at A1-31; the Opinion and Judgment of the trial court, not to be published, appears in Appendix B to the Petition herein at A32-44.

JURISDICTION

Respondent adopts the jurisdictional statement of Petitioners set out at page 2 of the Petition herein.

QUESTION PRESENTED

Do the facts in this case show that "state action", within the meaning of the First and Fourteenth Amendments, will necessarily become involved in the execution of the Trust here under consideration, and render it illegal as contended by Petitioners, simply because:

1. The Trustee of the Trust is a national bank.

2. All public charitable trusts in Missouri are given special privileges, such as partial tax exemptions and exemption from the operation of the rule against perpetuities.

3. The hospital beneficiaries of the Trust that will receive unrestricted gifts from the Trust may have become semipublic hospitals because of their close cooperation with federal agencies in a public field.

4. The Attorney General of Missouri is charged with the duty to protect the interests of the public at large in all public charitable trust matters and was named as a defendant in that capacity in a suit to construe certain language in this Trust.

5. The Trustee has filed a will construction suit asking the court to construe certain language of the Trust, and the court has done so.

STATEMENT OF THE CASE

Homer McWilliams, Deceased, created the McWilliams Memorial Hospital Trust by his Last Will and Testament, as amended by a First Codicil thereto, and funded that Trust out of his residuary estate.

The First National Bank of Kansas City, Missouri, a Respondent herein, is now the sole surviving Trustee of that Trust.

Under the terms of the Trust, the Trustee is required to distribute annually, substantially all of the income, in the form of unrestricted gifts to one or more hospitals, to be chosen by it in its sole discretion from a class of hospitals described in the Will as being "Protestant Christian Hospitals operated on a not-for-profit basis in Jackson County, Missouri" and/or to one or more patients in such hospitals, to be chosen by it in its sole and absolute discretion from a class of patients described in the Will as being "born of white parents".

Upon receipt of the Trust assets, the Trustee brought suit in a state court in Missouri, asking the court to construe the meaning of the language used by Homer McWilliams in describing the beneficiaries of his Trust. Named as defendants in that suit were the Attorney General of Missouri, all of the hospitals, both public and private, then licensed to operate in Jackson County, Missouri, and the known and unknown heirs at law of Homer McWilliams.

Only Count V of that Will Construction suit is pertinent to the issues here pending and that Count reads as follows (See Petitioners' Appendix C at A54):

COUNT V

24. Plaintiff further states that under the terms of said public charitable trust above mentioned, this plaintiff, as Trustee, is authorized to distribute certain income according to the trust as follows:

> ". . . in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a nonprofit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America. My Trustees shall not be confined nor limited in such contributions to such Hospitals as may be in existence at the time of my death, but may contribute to such hospitals of the character named, afterwards organized and in existence, and to the maintenance, support and care of patients of the class and character named in such hospitals. And I give my said Trustees, their survivors and successors, full power and authority to select, and to give these benefits of this Trust, and to make such distributions to, such Hospital and Hospitals of the kind and character aforesaid as in the judgment and discretion of the Trustees, then acting, as they, their survivor and successor or successors, shall determine to be giving and will continue to give the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid."

25. That this plaintiff is unable to ascertain with certainty the meaning of said words and cannot determine with certainty which hospitals in Jackson County, Missouri, and which patients therein, qualify

as possible beneficiaries of the trust. That certain hospitals in Jackson County, Missouri, are organized and operated as separate and independent not-for-profit or non-profit corporations, and in which patients of all religious faiths and races are treated, both for pay and as charity patients, w[illegible]ch are in fact partially supported by, or advised and counselled by, or controlled by a church; that many of said hospitals have been granted exemption from payment of Federal and State income taxes after investigation and examination, on the grounds that they are non-profit organizations.

WHEREFORE, this plaintiff prays that the Court hear the evidence bearing upon this question and after hearing the evidence construe said Will and enter its decree designating which hospitals in Jackson County, Missouri, and which patients therein qualify as proper and lawful beneficiaries to which this plaintiff may make payments under the terms of said trust.

At the trial, the evidence was uncontradicted to the effect that Homer McWilliams was a private individual; that the Trust here under examination was funded entirely out of his own private funds; that the Trustee, The First National Bank of Kansas City, Missouri, is a national bank organized under the national banking laws of the United States; that there are twenty-three licensed hospitals operating in Jackson County, Missouri; that nineteen of those hospitals admittedly had no special relationship whatsoever with any Protestant Christian Church; that the four remaining hospitals, St. Luke's Hospital, Kansas City Lutheran Home and Hospital Association, Baptist Memorial Hospital and Independence Sanitarium and Hospital, all did have a special relationship to a Protestant Christian Church, in that, while each such hospital was organized

as a separate Missouri non-profit corporation, the Charter of each such hospital required that at least a majority of its governing body be communicants or officials of a certain Protestant Christian Church.

The evidence was also uncontradicted to the effect that none of the twenty-three hospitals located in Jackson County, Missouri, including the four having a special relationship with a Protestant Christian Church, operated their hospitals in a discriminatory manner and that all of the facilities of all hospitals, including membership on the medical staff, was fully and equally open to all races and creeds.

The principal charge of illegality made by the Petitioners in the state courts was (1) that the Trustee, by selecting beneficiaries in the manner required by the trust, would be performing acts of religious and racial discrimination and (2) that such acts of discrimination would be illegal under the provisions of the First and Fourteenth Amendments because the trust cannot be executed without in some way involving "state action".

This Respondent defended against that charge on the ground that even if the method of selecting beneficiaries required by the trust did result in discrimination, such discrimination was not illegal and did not violate the provisions of the First and Fourteenth Amendments because no "state action" would be required in the execution of the trust.

The trial court entered judgment on Count V of the Will Construction Petition in these words (Not published —See Petitioners' Appendix B at A41):

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the words "Protestant Christian Hospital" as used in the Last Will and Testament of Homer McWilliams and the First Codicil thereto are construed to mean those hospitals that have some special relationship to and at least partial control by a Protestant Christian church.

2. That the words "Protestant Christian" as used in said Will and Codicil thereto are not indefinite, and the class of hospitals intended can be determined.

3. That the selection of beneficiaries of the trust according to the provisions of said Will and Codicil thereto will not result in unlawful discrimination based on race or religion and is lawful.

4. That the Baptist Memorial Hospital, the Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all qualify as proper beneficiaries under the Will of Homer McWilliams and the First Codicil thereto, and none of the other defendant hospitals do so qualify.

The judgment of the trial court was affirmed by the Supreme Court of Missouri. In its written opinion, not yet published, the Supreme Court of Missouri said, in part (See Petitioners' Appendix A at A22):

> Under the facts of this case, "state action" was not involved in the creation of the trust, nor is it required to carry out its term. Mr. McWilliams was a private individual, and the corpus of his trust derived solely from his private funds. The trustee is a privately owned bank and it selects beneficiaries in each class in an exercise of unlimited discretion. Nothing in the will limits the use of funds given to "Protestant Christian hospitals"; nothing prohibits or prevents such hospitals from using the money for

any purpose within the purview of their charters, including rendering services and offering facilities without regard to race, religion or national origin, and they do perform these functions without discrimination. Once the trustee has exercised its discretion as to which of the Protestant Christian hospitals provides the greatest measure of services to the poor and deserving of the class described and distributions are made to such hospitals, no provision of the will restricts the use of the funds by the hospitals. Similarly, the trustee has the discretion to select deserving individuals of the class of "sick and infirm patients in said hospitals born of white parents in the United States * * *." No public body is involved in the latter selection because payments to any such beneficiaries would flow directly from the trustee to them.

After Petitioners' Motion for a Rehearing in the Missouri Supreme Court was overruled, they filed this Application for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There is no special or important reason for granting this writ.

There is no serious dispute between Petitioners and Respondent over the law involved in this case. Both agree that if some form of discrimination will necessarily result from the execution of the Trust here under examination and that some form of "state action" will necessarily be required in the enforcement of that discrimination, that a violation of the First and Fourteenth Amendments will occur.

Our dispute is primarily a factual one involving the facts in this particular case, i.e., do the facts in this particular case show that "state action" will necessarily become involved in the execution of the Trust.

A determination of the issues presented by this case will not, therefore, serve as guidelines for other cases in which the facts may be different, and a factual situation such as that presented here is unlikely to occur frequently.

Only a few hospitals in Jackson County, Missouri, and a few patients therein will be affected by the outcome of this case and it therefore has no wide public importance.

We submit that there is no special or important reason for granting this writ and that it should be refused.

II. The decision of the Supreme Court of Missouri is correct and is not in conflict with any decision of this court.

The law is clear that discrimination that does not require some form of "state action" to enforce it, is not illegal under the First and Fourteenth Amendments. This rule has been laid down in many cases, one of which is *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, in which the court said:

> "It is clear, as it always has been since the Civil Rights Cases, supra, that 'Individual invasion of individual rights is not the subject-matter of the amendment' 109 U.S. at page 11, 3 S. Ct. at page 21, and that private conduct abridging individual rights does no violence to the Equal Protection Clause *unless to some significant extent the State in any of its manifestations has been found to have become involved in it.* (Emphasis added)."

Therefore, the Petitioners herein have, of necessity, been forced to contend not only (1) that the execution of the provisions of the Trust here under examination will result in religious and racial discrimination, but also (2) that some form of state action is necessarily involved in the enforcement of that discrimination.

While the Respondent herein denies that gifts made to hospitals in the manner required by the Trust will result in discrimination, the gifts being unrestricted and the hospitals not being religious institutions, it does admit that by limiting gifts to white patients only, discrimination will result.

But we further contend that even if all of the gifts to be made by the Trustee, to hospitals as well as to patients, will be discriminatory, they still will not be illegal, because no "state action" is necessary to enforce that discrimination.

When the arguments of the Petitioners presented in their Petition are stripped of their argumentative language, and sorted into their essential points, it is clear that the basic contention of the Petitioners is (1) that the execution of the Trust here under examination will necessarily result in religious and racial discrimination, (2) that "state action" either has or will necessarily become involved in the execution of the Trust and (3) that the decision of the Supreme Court of Missouri, holding that the Trust is not illegal and that state action will not become involved in its execution, is in error and is contrary to decisions of this court.

A further reading of Petitioners' argument shows that the alleged "state action" of which they complain, arises out of five, and only five, particular facts or situations. We will therefore take up each of these five facts or situations separately.

First: Petitioners claim that "state action" will become involved in the execution of this Trust because the Trustee is a national bank. This fact, they contend, makes the Trustee an agency of the federal government and its acts in connection with the Trust "state acts". We disagree. While a national bank is created and regulated by the federal government, just as a state bank is created and regulated by a state government, it is not an agency of the federal government, particularly when it is acting in its purely private capacity as a Trustee of a Trust. (See 9 C.J.S. 552 Banks) We do not find that Petitioner cites any cases that says it is. The Missouri Supreme Court held that the fact that a national bank is trustee of this trust did not show "state action". We submit that this holding was correct and was not in conflict with any ruling of this court.

Second: Petitioners claim that "state action" will become involved in the execution of this Trust because all public charitable trusts are given special statutory benefits such as partial exemption from taxation and exemption from the operation of the rule against perpetuities, and that by reason thereof, all public charitable trusts are agencies of the state. We disagree. Many types of institutions are treated differently under the law and tax preferences are quite commonly used to encourage corporations and individuals as well as trusts to enter certain fields of endeavor. We do not find that Petitioners have cited any case supporting this contention. We submit, that the holding of the Missouri Supreme Court on this point was correct and was not in conflict with any decision of this court.

Third: Petitioners claim that "state action" will become involved in the execution of this Trust because the hospital beneficiaries of the Trust have become semi-public

agencies by operating in a public field of endeavor. We disagree. Even if the hospitals were state institutions, which we deny, their acceptance of an unrestricted gift of cash, for use in whatever manner they desire in their non-discriminatory operation, would not constitute the involvement of state action. While Petitioners cite cases holding that under certain circumstances hospitals may become touched with a public interest, the facts in all of those cases show that it was the hospital itself and not the trustee, that instigated and enforced the discriminatory practices complained of. For example, it was the hospital that set up segregated wards for black patients. Such cases are not in point. We submit that the ruling of the Supreme Court of Missouri on this point was correct and did not conflict with any decision of this court.

Fourth: Petitioners claim that "state action" has become involved in the execution of this Trust because the Attorney General of Missouri was named as a defendant in the will construction suit. We disagree. Under the law of Missouri, the Attorney General is the representative of the people at large and is required to be made a party to all suits involving a public charitable trust. He takes no part whatever in the execution of the trust itself, and his only duty is to see that no court ruling is entered that is adverse to the public at large. (*See Thatcher* v. *City of St. Louis*, 122 S.W.2d 915) We submit that the ruling of the Supreme Court of Missouri on this point was correct and did not conflict with any decision of this court.

Fifth: Petitioners claim that "state action" has become involved in the execution of this Trust because the bringing of the will construction suit invoked state action. We disagree. This court has specifically held in *Evans* v. *Abney*, 396 U.S. 435, that the bringing of a will construc-

tion suit does not constitute the involvement of "state action". In all the cases cited by Petitioner, the court was asked not only to construe an instrument, but also to go a step further and provide affirmative action to *enforce* a discriminatory instrument. In this case the only relief asked for in the petition was a simple construction of the meaning of certain words (See Count V of the Petition set out in full in our Statement of the Case, *supra*), and all the relief granted was a construction of the meaning of those words. (See Judgment Entry on Count V set out in full in our Statement of the Case, *supra*) No affirmative action by the court was either requested or granted. Petitioners' cases are not in point. We submit that the ruling of the Supreme Court of Missouri on this point was correct and did not conflict with any decision of this court.

Since none of the facts or situations pointed out by Petitioners as evidence that "state action" is necessary in the execution of the trust, show that such "state action" is necessary, it follows that even if the method of selecting beneficiaries of the Trust will result in discrimination, that discrimination is not illegal because no "state action" is required to enforce it.

We do not consider the other statutory and constitutional provisions cited by Petitioners as being pertinent to the facts here before the court.

CONCLUSION

We, therefore, submit that the decision of the Missouri Supreme Court is correct and is not in conflict with any decision of this court, and that the Petition for a Writ herein should be denied.

Respectfully submitted,

HILARY A. BUSH
KENT SNAPP
1414 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Respondent, The First National Bank of Kansas City